CHONG KAI TAI RINGO & ANOR.

v.

LEE GEE KEE & ANOR.

PRIVY COUNCIL
LORD STEYN
LORD HOFFMANN
LORD HOPE OF CRAIGHEAD
LORD CLYDE
LORD HUTTON
[PRIVY COUNCIL APPEAL NO: 27 OF 1996]
17 MARCH 1997

CIVIL PROCEDURE: *Pleadings - Point not pleaded - Point explored in evidence in Court of first instance - No objection from opposing party - Whether appeal Court in error in holding that point could not be considered*

CONTRACT: *Sale and purchase of property - Obligations of purchaser and seller - Whether simultaneous - Normal rule - Whether can be displaced by express or implied term to the contrary*

CONTRACT: *Time - Whether of the essence - Whether time ceases to be of the essence if neither party can complete by completion date - Whether reasonable time for completion should be allowed*

CONTRACT: *Specific performance - Clause providing for damages in event of default by vendor - Vendor forfeits deposit because of purchaser's failure to pay balance - Vendor also unable to complete by completion date - Whether vendor entitled to rely on damages clause - Whether purchaser can claim specific performance*

The appellants ('the purchasers') entered into a written provisional agreement in Chinese ('the agreement') on 6 July 1991with the respondents ('the vendors') for the sale and purchase of a flat in Hong Kong for HK$1,870,000 under the terms of which the purchasers paid an initial deposit of HK$50,000 upon signing and were to pay HK$137,000 on 12 July 1991 and the balance of HK$1,683,000 on 17 July 1991. No formal agreement was entered into. The terms of the agreement provided, *inter alia*, that if the purchasers were to default on payment, the initial deposit would be forfeited and if the vendors were to default, double the amount of the initial deposit was to be paid as compensation. The purchasers failed to make payment by 17 July and the vendors purported to accept the repudiatory breach and forfeited the deposit.

The purchasers sued for specific performance. In the High Court, it was held that time was not of the essence of the agreement and the purchasers were entitled to complete the transaction within a reasonable time after 17 July 1991. On appeal to the Court of Appeal, it was held that taking into account the very heated property market in Hong Kong at the time of the sale, time was of the essence and it was not necessary to imply that completion by the vendors was to be simultaneous with payment by the purchasers. The Court of Appeal found that the purchasers had been in breach by failing to pay the balance before midnight on 17 July 1991 and accordingly were not entitled to specific performance. The purchasers appealed.

The issues in this appeal were: (i) whether the purchasers' obligation to make payment was concurrent with the vendors' obligation to deliver a valid assignment; (ii) whether the vendors were unable to complete by delivery of the assignment before midnight on 17 July 1991; (iii) if so, whether they were thereby debarred from claiming that the purchasers had repudiated the agreement by non-payment on that date; and (iv) whether the purchasers were entitled to specific performance.

Held:

Per Lord Hutton

[1] There is clear authority that the obligation of the purchaser to pay and the obligation of the vendor to complete by giving an executed assignment are to be carried out simultaneously unless there is an express or implied term to the contrary. The correct approach is not whether it was 'necessary' or 'possible' to imply a term that payment and completion by the vendors were to be simultaneous, as stated by the Court of Appeal, but whether there was an implied term that there would be a departure from the normal rule that they would be simultaneous. In the present case, there was nothing to displace the normal rule.

[2] The evidence established that the vendors were not in a position to complete the transaction before midnight on 17 July 1991. The Court of Appeal's finding that this point was not pleaded or explored evidentially in the High Court was incorrect as it had been explored in the evidence and no objection was taken by the vendors that the point had not been adequately pleaded by the purchasers.

[3] As the vendors were unable to deliver an executed assignment to the purchasers on 17 July 1991, they were not entitled to claim that the purchasers had repudiated the contract by failing to pay the balance of the purchase money on that date. In the circumstances, time ceased to be of the essence of the contract and the parties had a reasonable time in which to complete the transaction.

[4] Although the agreement provided for the return by the vendors of an amount equal to double the initial deposit in the event of their default, the vendors never offered to pay the sum but claimed the contract was ended by the purchasers' repudiation. The vendors could not therefore now seek to rely on the said clause to argue that the purchasers were not entitled to specific performance.

[Appeal allowed. Order of High Court for specific performance restored.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Pliding - Perkara tidak diplidkan - Perkara ditinjau dalam keterangan dalam Mahkamah yang pertama - Tiada bantahan daripada pihak yang membantah - Samada Mahkamah rayuan tersalah dalam memutuskan bahawa perkara tidak boleh dipertimbangkan*

KONTRAK: *Jualbeli Hartanah - Kewajipan pembeli dan penjual - Samada serentak - Kaedah biasa - Samada boleh berubah melalui terma nyata atau tersirat yang sebaliknya*

KONTRAK: *Perlaksanaan kontrak - Masa - Samada merupakan intipati - Samada masa tidak lagi menjadi intipati jika tiada pihak boleh menamatkan pada tarikh penyiapan - Samada masa yang wajar untuk penyiapan harus dibenarkan*

KONTRAK: *Remedi - Perlaksanaan spesifik - Fasal memperuntukan gantirugi sekiranya berlaku kemungkiran oleh penjual - Penjual merampas deposit kerana kegagalan pembeli untuk membayar baki - Penjual juga gagal untuk menyiapkan pada tarikh penyiapan - Samada penjual berhak untuk bergantung pada fasal gantirugi - Samada pembeli boleh menuntut perlaksanaan spesifik*

Perayu-perayu ('pembeli-pembeli') telah memasuki satu perjanjian sementara bertulis dalam bahasa Cina ('perjanjian tersebut') pada 6 Julai 1991 dengan responden-responden ('penjual-penjual') untuk penjualan dan pembelian sebuah rumah pangsa di Hong Kong pada harga sebanyak HK$1,870,000 di bawah terma-terma yang mana pembeli-pembeli telah membayar deposit permulaan sebanyak HK$50,000 ketika menandatanganinya dan adalah dikehendaki untuk membayar HK$137,000 pada 12 Julai 1991 dan baki sebanyak HK$1,683,000 pada 17 Julai 1991. Tiada perjanjian rasmi telah ditandatangani. Terma-terma perjanjian tersebut memperuntukkan, antara lainnya, bahawa jika pembeli-pembeli memungkiri pembayaran, deposit permulaan akan dirampas dan jika penjual-penjual memungkiri, jumlah yang berganda daripada deposit permulaan itu hendaklah dibayar sebagai pampasan. Pembeli-pembeli telah gagal untuk

membuat pembayaran selewat-lewatnya pada 17 Julai dan penjual-penjual dikatakan menerima kemungkiran penolakan itu dan merampas deposit tersebut.

Pembeli-pembeli telah mendakwa untuk mendapatkan perlaksanaan spesifik. Dalam Mahkamah Tinggi, telah diputuskan bahawa masa tidak merupakan intipati perjanjian itu dan pembeli-pembeli berhak untuk menamatkan transaksi tersebut dalam tempoh masa yang wajar selepas 17 Julai 1991. Apabila dirayu kepada Mahkamah Rayuan, telah diputuskan bahawa dalam mengambilkira pasaran hartanah yang sebegitu menggalakkan di Hong Kong pada waktu penjualan itu, masa merupakan intipati dan ianya adalah tidak perlu untuk menunjukkan bahawa penyempurnaan oleh penjual-penjual hendaklah sama serentak dengan pembayaran oleh pembeli-pembeli. Mahkamah Rayuan mendapati bahawa pembeli-pembeli telah melakukan kemungkiran dengan kegagalan untuk membayar baki sebelum tengah malam pada 17 Julai 1991 dan berikutan itu tidak berhak kepada perlaksanaan spesifik. Pembeli-pembeli telah merayu.

Isu-isu dalam rayuan ini adalah: (i) samada kewajipan pembeli-pembeli untuk membuat pembayaran adalah wujud secara bersama dengan kewajipan penjual-penjual untuk menghantar-serah satu serahanhak yang sah; (ii) samada penjual-penjual gagal untuk menyiapkan melalui penghantar-serahan serahanhak selewat-lewatnya sebelum tengah malam pada 17 Julai 1991; (iii) jika sedemikian, samada mereka adalah dengan itu dihalang daripada menuntut bahawa pembeli-pembeli telah menolak perjanjian itu dengan tidak membuat pembayaran pada tarikh itu; dan (iv) samada pembeli-pembeli berhak kepada perlaksanaan spesifik.

Diputuskan:
Oleh Lord Hutton

[1] Terdapat autoriti yang jelas bahawa kewajipan pembeli untuk membayar dan kewajipan penjual untuk menyiapkan dengan memberikan satu serahanhak yang telah disempurnakan hendaklah dijalankan secara serentak melainkan terdapat terma yang nyata dan tersirat yang bertentangan. Pendekatan yang betul bukannya samada ianya "perlu" atau "mungkin" untuk mengandaikan satu terma bahawa pembayaran dan penyiapan oleh penjual-penjual hendaklah serentak, sepertimana yang dinyatakan oleh Mahkamah Rayuan, tetapi samada terdapatnya terma tersirat bahawa akan berlaku penyimpangan daripada kaedah biasa, bahawa ianya akan berlaku serentak. Dalam kes semasa ini, tidak terdapat apa-apa untuk menidakkan kaedah biasa.

[2] Keterangan menunjukkan bahawa penjual-penjual tidak mempunyai kedudukan untuk memenuhi atau menyiapkan transaksi itu sebelum tengah malam 17 Julai 1991. Keputusan Mahkamah Rayuan bahawa perkara ini tidak diplidkan atau ditinjau dalam keterangan dalam Mahkamah Tinggi adalah tidak betul kerana ianya telah ditinjau dalam keterangan dan tiada bantahan telah dilakukan oleh penjual-penjual tersebut bahawa perkara itu telah tidak diplidkan secukupnya oleh pembeli-pembeli.

[3] Oleh kerana penjual-penjual tersebut tidak berjaya menghantar-serahkan suatu serahanhak yang telah disempurnakan kepada pembeli-pembeli pada 17 Julai 1991, mereka adalah tidak berhak untuk menuntut bahawa pembeli-pembeli tersebut telah menolak kontrak itu kerana gagal untuk membayar baki wang pembelian pada tarikh itu. Dalam keadaan yang sedemikian, masa tidak lagi menjadi intipati kontrak dan pihak-pihak tersebut mempunyai masa yang munasabah untuk menyempurnakan transaksi.

[4] Walaupun perjanjian tersebut memperuntukkan pembayaran balik oleh penjual-penjual jumlah yang sekali ganda jumlah deposit permulaan sekiranya mereka mungkir, namun penjual-penjual tidak pernah menawarkan untuk membayar jumlah itu tetapi sebaliknya menuntut bahawa kontrak itu telah ditamatkan oleh penolakan pembeli-pembeli. Dengan itu penjual-penjual kini tidak boleh cuba untuk bergantung kepada fasal tersebut untuk berhujah bahawa pembeli-pembeli adalah tidak berhak kepada perlaksanaan spesifik.

Cases referrd to:
Palmer v. Lark [1945] Ch. 182 ***(foll)***
Edward Wong Finance Co. Ltd. v. Johnson, Stokes & Master (a firm) [1984] AC 296 ***(foll)***
Camberra Investment Ltd. v. Chan Wai-tak [1989] 1 HKLR 568 ***(foll)***
Abdul Cader Abdeen v. Abdul Careem Mohamed Thaheer [1958] AC 116 ***(refd)***

[Appeal from Court of Appeal, Hong Kong]

JUDGMENT

Lord Hutton:

The issue arising on this appeal is whether the Court of Appeal of Hong Kong was right in setting aside an order made by the High Court for specific performance of an agreement to sell a flat in the New Territories in Hong Kong.

On 6 July 1991 the parties entered into a written provisional agreement ('the agreement') in Chinese writing on a form produced by an estate agent whereby the appellants agreed to purchase and the respondents agreed to sell Flat G, 38th Floor of Block 2, Belvedere Garden, Phase 3, Tsuen Wan. The purchase

price was HK$1,870,000. The agreement contained the following provisions for payment:

Initial deposit will be paid upon signing this provisional Sale and Purchase Agreement	Initial Deposit	**HK$50,000**
The Purchaser must pay the first payment at Solicitors firm on 12th July 1991	First payment	HK$137,000
The Purchaser must pay the balance of the purchase price on 17 July 1991	Balance	**HK$1,683,000**

The agreement contained a number of clauses under the heading "Terms of Agreement for both Parties". There were nine clauses and the relevant clauses (as translated into English by the respondents whose translation did not differ materially from the appellants' translation) were as follows:

(3) Transaction by vacant possession before signing the Assignment.

(4) If in the midway the Purchaser does not perform this agreement, then the initial deposit paid would be forfeited by the Seller, who has the right to resell the property in any way or to keep it for self-use, and the Purchaser is not entitled to dispute.

(5) If the Seller fails to perform this agreement, a double amount to the initial deposits must be paid to the Purchaser as compensation, Hong Kong Currency 100,000. The Seller is entitled to re-sell the property in any way or for self-use, the Purchaser cannot dispute.

(6) The initial deposit paid by the Purchaser will be confirmed **upon being acknowledged** by the Seller, otherwise it will be returned and there is no claim on each other.

After the agreement had been signed on 6 July 1991, although there was some correspondence between the respective solicitors about a formal agreement, no such agreement was entered into between the parties.

The sale to the appellants was the last in a chain of sales and sub-sales. On 10 January 1990, when the building containing the flat had not been completed, Ling Fung Development Limited ('the developers') and others agreed to sell the flat to Wong Mui Chun and Chan Po Shan. On 7 March 1991 Wong Mui Chun and Chan Po Shan agreed to sell it to Jiu Sze Man. On 10 April 1991, Jiu Sze Man agreed to sell it to Lee Gee Kee and Hung Ming Ming, the respondents.

In the Court of Appeal Litton VP observed that the sale between the appellants and the respondents took place "in a very heated market" and Ching JA stated:

> There is an enormous amount of speculation in the sale and purchase of flats of this type, probably undreamed of in other jurisdictions. When a new development is put on the market people queue up, sometimes overnight, for flats. Some of them have neither the ability nor the intention to complete the purchase. They queue up simply so that they can sell their places in the queue to those who come later for many tens of thousands of dollars. Others sign a provisional agreement and put down a deposit knowing that they do not have and will not be able to obtain the finance to make subsequent payments, perhaps even the first of them. Those who buy from them may be in a similar position and it is not uncommon for there to be four or five sub-purchasers before there is an assignment, usually at or about the time of the completion of the building. For these reasons it is important to each of the vendors that payment should be made on time.

The appellants duly paid the deposit of HK$50,000 and also made the first payment of HK$137,000 on 12 July 1991.

Their Lordships consider it to be clear that after the signing of the agreement on 6 July 1991 the solicitors for both the vendors and the purchasers treated 17 July 1991 as the date for completion. On 12 July 1991 the purchasers' solicitors, Messrs. Lam, Lee and Lai, wrote to the vendors' solicitors, Messrs. Boris Lui & Co., and stated:

> Please note that the date of completion mentioned in the above Provisional Agreement for Sale and Purchase i.e. 17 July 1991 is approaching, we would request at least 7 working days to peruse all the title deeds and documents and should be grateful if you would let us know whether your client would like to postpone the completion date.

However, it is clear from the evidence of Miss Lam Chu Dik, a conveyancing clerk in the office of the vendors' solicitors, that they did not agree to this request to postpone the completion date.

On 17 July 1991 the vendors' solicitors wrote to the purchasers' solicitors as follows:

> We refer to the telephone conversation between your Miss Chow and our Miss Lam this morning.
>
> According to the Chinese Provisional Agreement for Sale and Purchase dated 6 July 1991, the completion of the sale and purchase of the above property will be taken place on today. Therefore, we shall be obliged if you will let us have your draft Assignment for our approval and let us have your cheque for the sum of HK$1,683,000 on or before 4.00 p.m. today.

Your attention in this matter is highly appreciated.

On 17 July 1991 after receipt of this letter by fax the purchasers' solicitors wrote to the vendors' solicitors and stated:

> We refer to our letter to you dated 15 July 1991 and your reply letter dated 16 July 1991 which we received at about 11.00 a.m. on 17 July 1991.
>
> We also refer to the numerous telephone conversation between your Miss Lam and our Miss Chow in which your Miss Lam (threatened) us that if our client could not send the balance of purchase price of our clients' purchase of the above property to your office in Yuen Long before 4.00 p.m., your client would forfeit all deposit paid by our client before and would treat the provisional Agreement for Sale and Purchase dated 6 July 1991 as repudiated by our client.
>
> We consider that such attitude taking by your client is very unreasonable on the following grounds:
>
> 1. In our letter dated 15.7.1991, we have raised certain requisitions of your client's title to the above property and not until about 11.00 a.m. this morning, you have given us a satisfactorily reply, which leaves us no time to prepare completion.
>
> 2. At 3.31 p.m., you have faxed to us a letter to us requesting for a draft Assignment for your approval and for a sum of HK$1,683,000 on or before 4.00 p.m. today. We consider that your requests are very unreasonable without giving us time to prepare the draft Assignment and to obtain a mortgage loan from our client's proposed mortgagee. We would like to confirm that we have received mortgage instructions as early as on 12 July 1991 to prepare a mortgage whereby the lender will finance our client to purchase the above property.
>
> 3. The Provisional Agreement for Sale and Purchase dated 6.7.1991 does not make time is of the essence of the contract.
>
> 4. In all circumstances, we consider that our client is entitled to have a reasonable time to complete their purchase of the above property.
>
> Our Mr. Lam has tried to (contact) your Miss Lam by telephone twice but could not get in touch with her. Neither does your Miss Lam give a return call to our Mr. Lam even our Mr. Lam has left a message to her.
>
> Anyway, we are now preparing the draft assignment and shall send to you for your approval as soon as we can.
>
> If your client chooses to take an unreasonable attitude to terminate the Provisional Agreement for Sale and Purchase, we are instructed to take all legal steps to enforce our clients' rights under the Provisional Agreement for Sale and Purchase.

On 17 July 1991 the purchasers' solicitors wrote a further letter to the vendors' solicitors. This letter was not sent until the next day, 18 July 1991. It stated:

> We refer to our letter to you of today's date and now send you herewith our draft Assignment in respect of the above property for your approval on behalf of your client, the 3rd Confirmor herein.
>
> Please let us have the following reply:
>
> 1. our draft Assignment in respect of the above property duly approved by the Vendor, 1st Confirmor's solicitors, 2nd Confirmor's solicitors and yours; and
>
> 2. your specific instructions as how should we split our cheques covering the balance of purchase price.

On 18 July 1991 the vendors' solicitors wrote to the purchasers' solicitors claiming that the purchasers had wrongfully repudiated the agreement and stating that the repudiation was accepted by the vendors:

> We refer to our letter to you dated 17 July 1991 and up to this moment you still fail to send us the balance of purchase price for the sum of HK$1,683,000.
>
> According to the Chinese Provisional Agreement for Sale and Purchase dated 6 July 1991 made between our representative client completion of the Sale and Purchase ought to take place on 17 July 1991. Your client has wrongly repudiated the said Agreement which repudiation is accepted by our client. In the circumstances, our client hereby forfeit the initial deposit paid by your client to ours under the said Agreement and reserve all their rights in the above matter.
>
> In the meantime, we enclose herewith a cheque for the sum of HK$137,000 drawn in your favour being the further deposit and shall be obliged if you will return all the title deeds and documents to us on or before 4.00 p.m. today.

The purchasers' solicitors requested the vendors' solicitors to withdraw their letter of 18 July 1991 alleging repudiation of the agreement by the purchasers, but the allegation was not withdrawn and on 29 July 1991 the purchasers issued a writ of summons claiming specific performance of the agreement.

In the High Court Deputy Judge Pang held that time was not of the essence of the agreement and that the purchasers were entitled to complete the transaction within a reasonable time after 17 July 1991. He therefore made an order for specific performance.

In the Court of Appeal all three members of the Court held that time was of the essence, and this finding was not challenged by the appellants before their Lordships' Board. The majority, Litton VP and Ching JA, allowed the vendors' appeal and held that, having regard to the circumstances obtaining in Hong

Kong, it was not necessary to imply that completion by the vendors was to be simultaneous with payment by the purchasers, and that the purchasers had been in breach by their failure to make payment of the balance of the purchase money before midnight on 17 July 1991, but that the vendors had not been in breach. Accordingly they ruled that the purchasers were not entitled to an order for specific performance.

Godfrey JA, dissenting, held that the obligation of the purchasers to make payment was concurrent with the obligation of the vendors to deliver an executed assignment on 17 July 1991, and that as the vendors were not able to hand over the executed assignment on 17 July they could not treat the purchasers as having repudiated the agreement by not paying the balance of the purchase price on that date.

Therefore three questions arise for the consideration of this Board. First, were the obligations of the parties concurrent so that payment by the purchasers and delivery of the assignment by the vendors were to be simultaneous? Secondly, were the vendors unable to complete by delivery of the assignment before midnight (pursuant to the Hong Kong "midnight rule") on 17 July 1991? Thirdly, if the vendors were unable to make delivery of the assignment before midnight on 17 July, were they thereby debarred from claiming that the purchasers had repudiated the contract by non-payment on that date?

There is clear authority that the obligation of the purchaser to pay and the obligation of the vendor to complete by giving an executed assignment are to be carried out simultaneously unless there is an express or implied term to the contrary. In *Palmer v. Lark* [1945] Ch. 182, 184 Vaisey J stated:

> It is a fundamental principle that the payment of the purchase money and the delivery of the conveyance are to be simultaneous acts to be performed interchangeably.

In *Edward Wong Finance Co. Ltd. v. Johnson, Stokes & Master (a firm)* [1984] AC 296, 303 delivering the judgment of this Board Lord Brightman stated:

> The normal method of completing a contract for the sale of land in England is for the purchaser's solicitor to deliver to the vendor's solicitor a draft for the balance of the purchase money in exchange for an executed grant of the land or interest in land contracted to be sold; if the property is subject to a mortgage, the mortgagee will either be a party to the grant and receive the whole or part of the purchase money by way of redemption; or he will execute a separate release of his charge in return for the redemption money; if the property purchased is to be financed by a new mortgage, the loan will be made against delivery of the executed grant and instrument of charge. In other words, the payment of

> money and perfection of title are simultaneous transactions. This procedure is merely a reflection, in the context of a contract for the sale of land, of the common-sense principle that, in the absence of an agreement for credit, the purchase money is not handed over to the vendor or anyone else except in exchange for the delivery of the subject matter of the sale, whether it be a loaf of bread or a parcel of land; and, if a loan is made on security, the money advanced is not handed over save in exchange for a charge executed by a person who can show a good title to the intended security.

Therefore their Lordships respectfully differ from the opinion of the majority of the Court of Appeal who approached the point by asking was it "possible" (Ching JA) or "necessary" (Litton VP) to imply a term that payment and completion by the vendors were to be simultaneous and concluded against the background of the very heated market that it was not. Their Lordships are of opinion that under the principle stated by Vaisey J the question is not whether the circumstances require the implication of a term that payment and completion were to be simultaneous, but whether the circumstances require the implication of a term that there would be a departure from the normal rule that they would be simultaneous, and their Lordships consider that there is nothing in the discussions and correspondence between the parties and in the background to give rise to the implication of such a term.

Mr. Oliver QC, for the respondents, submitted that the parties contemplated a "Hong Kong style" completion under which the vendors' solicitors would not hand over an executed assignment in return for the balance of the purchase money, but would on or before receipt of the payment give undertakings relating to the execution and delivery of the assignment and the giving of vacant possession. However, as Godfrey JA pointed out, the agreement did not so provide and, moreover, there were no discussions or correspondence between the parties as to the giving of undertakings or as to their terms, and their Lordships consider that there was nothing to displace the requirement that the executed assignment was to be delivered simultaneously with the payment of the balance of the purchase price.

Their Lordships now turn to consider the second question whether the vendors were unable to complete by delivering an executed assignment before midnight on 17 July 1991. In their Lordships' opinion the evidence established that the vendors were not in a position to complete before that time. It had been agreed in the correspondence between the solicitors that it was necessary that one of the parties in the chain of sales and sub-sales. Jiu Sze Man (referred to as 'the 2nd Confirmor'), should execute the assignment to the purchasers. In a letter of 15 July 1991 the purchasers' solicitors requested:

> Therefore the 2nd Confirmor is required to execute the Assignment to our client personally as the 2nd Confirmor and as attorney for the 1st Confirmor if the 1st Confirmor will not execute the Assignment personally.

By a letter dated 16 July 1991 the vendors' solicitors agreed to this request and stated:

> We shall procure the 2nd Confirmor, Jiu Sze Man, to execute the Assignment upon completion as the 2nd Confirmor and as attorney for the 1st Confirmor.

However the vendors' answer to an interrogatory from the purchasers and the evidence of Miss Lam, the conveyancing clerk employed by the vendors' solicitors, revealed that they had taken no steps to ensure that Jiu Sze Man would be present in their office on 17 July 1991 to execute the assignment to the purchasers. The answer was as follows:

> To Interrogatory No. 7(a), namely, 'Look at the letter of Lam, Lee & Lai dated 15 July 1991:
>
> (a) In paragraph 2:
>
> Did the 2nd confirmor attend your instructing solicitors' premises in Yuen Long at 4.00 p.m. or shortly thereafter for completion? If the answer is in the negative, stated why he did not,', I, to the best of my knowledge, information and belief and subject to further investigation, say:
>
> No, because by their letter 16 July 1991 to Lam, Lee and Lai, Boris Lui & Co. had replied that they shall procure the 2nd confirmor, Jiu Sze Man, to execute the assignment upon completion as the 2nd confirmor and as attorney for the 1st confirmor. Further, the plaintiffs failed to pay the balance price of HK$1,683,000 on 17 July 1991.

In cross-examination Miss Lam said:

> Q. You wrote on 16 July 1991, item 2:
>
> 'We shall procure the second confirmor, Jiu Sze Man, to execute the Assignment upon completion as the second confirmor as attorney for the first confirmor'.
>
> Do you see that ?
>
> A. Yes.
>
> Q. You didn't arrange for him to attend at the completion at five to four, did you?
>
> A. Right.

A little later in cross-examination Miss Lam said:

> Q. Now, Madam - so you would agree with me, would you not, that there could be no completion taking place at 4 o'clock on that day ?
>
> A. I will promise them that they would be done later.

In his judgment Ching JA stated that the purchasers had not pleaded in their amended reply that the vendors were not able to complete on 17 July by handing over an executed assignment, and that no evidence was given and no cross-examination was carried out on this point. Litton VP also stated that as the point whether the vendors were able to complete on 17 July had not been explored evidentially in the High Court, it would not be right for the Court of Appeal to make a finding on the point. However their Lordships observe, with respect, that the two passages from the cross-examination of Miss Lam set out above make it clear that the point that the vendors were unable to complete on 17 July was explored in the evidence and no objection was taken by the vendors that this point had not been adequately pleaded by the purchasers in their reply.

Mr. West, for the purchasers, submitted that there were two further reasons why the vendors were unable to perform their obligations under the agreement before midnight on 17 July 1991. Clause 3 of the agreement provided:

> Transaction by vacant possession before signing the Assignment.

Mr. West submitted that the evidence of Miss Lam in cross-examination made it clear that the vendors' solicitors had not made the necessary arrangements to be able to give vacant possession before midnight on 17 July:

> Q. Madam, the reason you imposed this time limit was you know that you hadn't asked for vacant possession of the flat from the developer, isn't that right ?
>
> A. Right.

If the agreement presently under consideration had been made in England in the English language relating to property in this country, their Lordships would have been of opinion that this submission was correct. But in his judgment Ching JA stated:

> Attention was drawn to cl. (3) of the provisional agreement which, so far as it was not deleted, provided:
>
> > Transaction by vacant possession before signing the Assignment.
>
> Whatever this may mean it is difficult to see how this assists the plaintiffs. The words in the Chinese Language for vacant possession are perfectly well

understood. They mean that when the assignment is made there must be no sitting tenant or other occupant.

As their Lordships would be slow to differ from a Judge in Hong Kong as to the meaning of a clause in a contract written in the Chinese language, and as the point is not vital to the decision of this appeal, their Lordships do not propose to express an opinion on this submission.

The decision of this Board in the *Edward Wong Finance Company* case established that a solicitor for a purchaser buying a property subject to a mortgage to be discharged from the purchase monies would be at risk of liability for professional negligence if he failed to split the completion cheque between the vendor's solicitor and the vendor's mortgagee.

It was submitted by Mr. West on behalf of the purchasers that the vendors were further in breach of their obligations because their solicitors had failed to supply the purchasers' solicitors with the necessary information as to splitting the cheque between the vendors and their mortgagee before midnight on 17 July 1991. In reply to this submission Mr. Oliver contended that there was no obligation imposed upon the vendors' solicitors to give this information before the purchasers' solicitors requested it, and that the purchasers' solicitors had not requested this information until 18 July on which date they transmitted their letter dated 17 July 1991. Having regard to their decision that the vendors were unable to perform their obligation to deliver the executed assignment before midnight on 17 July 1991, their Lordships consider it unnecessary to express an opinion on this point.

In relation to the third question their Lordships consider it to be clear that as the obligations of both parties were concurrent and as the vendors were unable to deliver an executed assignment to the purchasers on 17 July, they were not entitled to claim that the purchasers had repudiated the contract by failing to pay the balance of the purchase money on that date. In those circumstances time caused to be of the essence of the contract and the parties had a reasonable time in which to complete. The position was well stated by Hunter JA in *Camberra Investment Ltd. v. Chan Wai-tak* [1989] 1 HKLR 568, 574:

> I regard the point as fundamental and very relevant as revealing both parties to have been at fault. Their obligations under cl. 3 were mutual. The duty of the defendant to tender an executed assignment and that of the defendant to tender an executed assignment and that of the plaintiff to tender the balance of the purchase price were concurrent conditions. Neither performed: neither tendered: neither triggered the corresponding obligation of the other. The defendant neither executed nor tendered an assignment before 1 pm and thereafter was denying his obligation so to act and preventing his solicitor from taking any step to that end. The plaintiff tried to tender and failed. The cheque constituted at most

conditional payment and not the 'full' payment required. An effective tender required cash or its equivalent, neither of which was available that Saturday afternoon.

In my judgment this contract remained uncompleted at midnight on 28 February by the fault of both parties. It did not then terminate as was at one time suggested. It remained on foot with the substitution of a reasonable time for the failed express condition.

Accordingly, their Lordships have formed the opinion (for reasons which are substantially the same as those given by Godfrey JA) that as the vendors were not in a position to complete before midnight on 17 July 1991 they were not entitled to claim that the purchasers had repudiated the agreement by not paying the balance of the purchase money before midnight on that date.

Their Lordships further observe that the decision of the majority of the Court of Appeal that payment by the purchasers and completion by the vendors were not to be simultaneous appears to have been influenced by two factual assumptions which their Lordships were informed were incorrect. These were that the building was not completed at the time the parties entered into the agreement of 6 July 1991, and that the earlier purchasers in the chain from the developers were unable to make payment under their respective contracts until the vendors in this case had received payment from their purchasers. But their Lordships were informed on the hearing of this appeal that it was not in dispute that the building had been completed and that the earlier vendors had been paid before the agreement of 6 July 1991 was signed by the parties.

The final issue for determination is whether the purchasers are entitled to an order for specific performance. It is not in dispute that they are ready and willing to perform their obligations under the agreement. But it is submitted on behalf of the vendors that cl. 5 of the agreement (the terms of which are set out in the earlier part of this judgment) operates to bar the remedy of specific performance and restricts the purchasers to recovering $100,000, being double the amount of the initial deposit.

Mr. Oliver submitted that cls. 4 and 5 were to be read together and made provision for the only remedies available if either the purchasers or the vendors were in breach of their obligations under the agreement. He pointed to the word "must" in cl. 5 and submitted that the clause was not drafted in terms which gave the purchasers an option as to the remedies they could pursue, but that the clause restricted them to the receipt of double the amount of the initial deposit. He further argued that the second sentence of the clause, stating that the purchasers, could not dispute a resale by the vendors, was inconsistent with a right in the purchasers to claim specific performance.

The vendors' reliance on cl. 5 gives rise to two questions. One question is whether, even if cl. 5 would have barred a claim for specific performance if the vendors had accepted that they were in default in performing their obligations and had offered to pay $100,000 pursuant to the clause, they can now rely on the clause having failed to offer payment under it and having claimed that the purchasers had repudiated the agreement. The other question is whether, if they had offered to pay $100,000 timeously, cl. 5 would have barred a claim for specific performance. Godfrey JA answered the first question against the vendors and stated:

> **Are the purchasers entitled to specific performance?**
>
> In my judgment, they are. Although the agreement contained the familiar provision providing in certain circumstances for the return by the vendors to the purchasers of an amount equal to double the purchasers' deposit, the right to so is not a right which the vendors ever claimed to exercise. They purported to forfeit the purchasers' deposit altogether and to call off the transaction. Had they elected, instead, to pay to the purchasers the 'double amount to the initial deposits' mentioned in the agreement, the case might have been very different. But the vendors, having elected (without sufficient justification) to treat the contract as at an end, cannot be allowed now to resile from that election.

Their Lordships are in agreement with this part of the judgment of Godfrey JA in relation to the first question and are of opinion that, as the vendors never offered to pay the sum specified in cl. 5 but claimed that the contract was ended by reason of repudiation by the purchasers, they cannot now seek to rely on the clause.

In relation to the second question Counsel cited the judgment of this Board in *Abdul Cader Abdeen v. Abdul Careem Mohamed Thaheer* [1958] AC 116 and a number of judgments of the Courts in Hong Kong. In those cases the decision whether a clause providing for the payment of a liquidated amount barred specific performance was a matter of construction turning on the precise wording of the individual clause. Having regard to their ruling on the first question their Lordships consider it unnecessary to decide as a matter of construction whether cl. 5 would have barred a claim for specific performance if payment had been offered in due time.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed, the order of the Court of Appeal set aside and the order of Deputy Judge Pang for specific performance restored. The respondents will pay the appellants' costs before their Lordships' Board and in the Court of Appeal.

Reported by Anne Khoo